

4 IN THE UNITED STATES DISTRICT COURT  
5 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
6  
7 LELAND BRAY, ) Case No. 08-0535 SC  
8 Plaintiff, )  
9 v. ) ORDER GRANTING DEFENDANT'S  
10 ) MOTION TO DISMISS  
11 MESSMORE KENDALL, HONEY TAYLOR, )  
12 MESSMORE KENDALL III, ALEXANDER )  
13 KENDALL, and DOES 1 through 100, )  
14 inclusive, )  
15 Defendants. )

## I. INTRODUCTION

17 Now before the Court is the Motion to Dismiss the First  
18 Amended Complaint for Lack of Personal Jurisdiction and Improper  
19 Venue ("Motion"), and Memorandum of Support ("Kendall Mem.") filed  
20 by Defendant Messmore Kendall ("Kendall"), Docket No. 16.  
21 Plaintiff Leland Bray ("Bray") filed an Opposition ("Opp'n").  
22 Docket No. 37. In this Court's Order of September 23, 2009, the  
23 parties were asked to submit additional briefing regarding the  
24 service and venue provisions of the Racketeer Influenced and  
25 Corrupt Organizations Act ("RICO"), as well as the jurisdictional  
26 consequences thereof. Docket No. 39. In response to that Order,  
27 Kendall has submitted a Supplemental Brief and Bray has submitted a  
28 Supplemental Opposition. Docket No. 42 ("Kendall Supplemental

1 Br."), 44 ("Supplemental Opp'n"). Having considered all of the  
2 papers submitted by both parties, the Court hereby GRANTS Kendall's  
3 Motion, for the reasons stated below.

4

5 **II. BAKCGROUND**

6 Bray is a citizen of the United States, with his primary  
7 residence in the State of California. First Am. Compl. ("FAC"),  
8 Docket No. 13, ¶ 1. At the end of 2003, the time that this dispute  
9 originated, Bray was residing with his wife in Baja California.  
10 Bray Decl.<sup>1</sup> ¶ 7. Kendall resides in Florida. Kendall Decl.<sup>2</sup> ¶ 2.  
11 Bray has acknowledged that Kendall and all other Defendants are not  
12 residents of California. FAC ¶ 2.

13 Kendall was the owner of a house in Puerto Vallarta, Mexico.  
14 Id. ¶ 7. He owned it pursuant to a bank trust with Bital Bank,  
15 which was later purchased by HSBC Bank. Id. Defendants Honey  
16 Taylor, Messmore Kendall III, and Alexander Kendall (collectively  
17 with Kendall, "Defendants") were subsequent beneficiaries of that  
18 trust. Id. Kendall listed the house for sale with PV Real Estate,  
19 a company that represents itself as being experienced in  
20 transferring property in Mexico to American citizens. Id. ¶¶ 8-9.  
21 PV Real Estate operates its business from Puerto Vallarta. See  
22 Bray Decl. Ex. A. In December of 2003, after viewing the website  
23 of PV Real Estate, Bray and his wife met with its agents and agreed  
24 to purchase Kendall's house. FAC ¶¶ 9-10. An escrow was opened at  
25 First American Title Company ("First American") in Sunrise,

26  
27 <sup>1</sup> Bray submitted a declaration in support of the Opposition.  
Docket No. 36.

28 <sup>2</sup> Kendall submitted a declaration in support of the Motion. Docket  
No. 18.

1 Florida.<sup>3</sup> Id. ¶ 11.

2 Bray claims that the contract and escrow instructions "omitted  
3 any mention of capital gains and fixed a specific date for closing  
4 of the sale without making any provision for extending the time for  
5 closing of the escrow in the event such was necessary." Id. ¶ 12.  
6 Bray claims that he was unaware of this problem, and after signing  
7 the documents, he wired \$44,000 as a 10% guaranteed deposit, and a  
8 \$500 escrow fee, from his bank in California to First American.  
9 Id. ¶¶ 13,14.

10 Bray claims that although Kendall signed a cession of rights  
11 with respect to the property and delivered it to HSBC, the bank  
12 refused to accept the cession of rights because it should have been  
13 signed by Kendall's attorney in fact, rather than by Kendall  
14 himself. Id. ¶¶ 16-17. Bray contends that PV Real Estate  
15 concealed this fact from him. Id. ¶ 17. Because Bray believed the  
16 transfer was underway, he authorized Kendall and PV Real Estate to  
17 immediately receive any money sent to the escrow account. Id.  
18 ¶ 18-19. Bray claims that sometime before February 13, 2004, his  
19 bank in California transferred the remaining \$400,000 in purchase  
20 money to First American, and this money was distributed before  
21 Kendall turned over the property to Bray. Id. ¶ 19. Bray also  
22 suggests that someone at PV Real Estate and/or Kendall "faxed  
23 forged documents purportedly signed by the Brays to First  
24 American." Id.

25 Although Bray and his wife eventually moved into the house,  
26 Bray never received legal title. Bray Decl. ¶¶ 16-18. The parties  
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28 <sup>3</sup> Bray also refers to this as First American Title Insurance  
Company. FAC ¶ 14.

1 attempted to resolve the dispute over the title for many years,  
2 however they have apparently been unable to resolve the question of  
3 who should be responsible for the capital gains tax. Id. ¶ 21. In  
4 January of 2008, Bray filed suit against Defendants in the Northern  
5 District of California. Bray asserts a total of ten causes of  
6 action, ranging from fraud and negligent misrepresentation to  
7 violation of RICO.

8

9 **III. LEGAL STANDARDS**

10 Rule 12(b)(2) of the Federal Rules of Civil Procedure permits  
11 a court to dismiss a suit for lack of personal jurisdiction over a  
12 defendant. "The burden of proof is on the plaintiff to show that  
13 jurisdiction is appropriate, but in the absence of an evidentiary  
14 hearing, the plaintiff need only make a *prima facie* showing of  
15 jurisdictional facts." Sher v. Johnson, 911 F.2d 1357, 1361 (9th  
16 Cir. 1990). The "court may consider evidence presented in  
17 affidavits to assist in its determination and may order discovery  
18 on the jurisdictional issues." Doe v. Unocal Corp., 248 F.3d 915,  
19 922 (9th Cir. 2001).

20 Generally, jurisdiction must comport with both the long-arm  
21 statute of the state in which the district court sits, as well as  
22 the constitutional requirements of due process. Mattel, Inc., v.  
23 Greiner & Hausser GmbH, 354 F.3d 857, 863 (9th Cir. 2003). The  
24 Ninth Circuit has recognized that the California long-arm statute,  
25 Cal. Code Civ. Proc. § 410.10, allows Courts to exercise  
26 jurisdiction consistent with the limits of the Due Process Clause  
27 of the Constitution, "so a federal court may exercise personal  
28 jurisdiction if doing so comports with federal constitutional due

1 process." Boschetto v. Hansing, 539 F.3d 1011, 1015-16 (9th Cir.  
2 2009).

3

4 **IV. DISCUSSION**

5 A defendant may be subject to personal jurisdiction within a  
6 particular judicial district pursuant to theories of either general  
7 or specific jurisdiction. See Boschetto, 539 F.3d at 1015-16. In  
8 either case, the "defendant must have at least 'minimum contacts'  
9 with the relevant forum such that the exercise of jurisdiction  
10 'does not offend traditional notions of fair play and substantial  
11 justice.'" Id. (quoting Schwarzenegger, 374 F.3d at 801). General  
12 jurisdiction "permits a defendant to be haled into court in the  
13 forum state to answer for any of its activities anywhere in the  
14 world," and requires that the defendant be engaged in "continuous  
15 and systematic general business contacts" that "approximate  
16 physical presence" in the forum. See Schwarzenegger, 374 F.3d at  
17 801 (quoting Helicopteros Nacionales de Colombia, S.A. v. Hall, 466  
18 U.S. 408, 416 (1984); Bancroft & Masters, Inc. v. Augusta Nat'l,  
19 Inc., 223 F.3d 1082, 1086 (9th Cir. 2000)).

20 Alternatively, "a court may exercise specific jurisdiction  
21 over a foreign defendant if his or her less substantial contacts  
22 with the forum give rise to the cause of action before the court."  
23 Unocal Corp., 248 F.3d at 923. The Ninth Circuit has developed a  
24 three-pronged test to determine whether specific jurisdiction over  
25 a non-resident defendant is appropriate:

26 (1) The non-resident defendant must purposefully  
27 direct his activities or consummate some  
transaction with the forum or resident thereof;  
or perform some act by which he purposefully  
28 avails himself of the privilege of conducting

activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

Boschetto, 539 F.3d at 1016 (quoting Schwarzenegger, 374 F.3d at 801).

**A. Whether Bray's RICO Claim Permits Personal Jurisdiction Before This Court Based on "National" Contacts**

10 The Court must first determine which forum is relevant for  
11 measuring minimum contacts and determining personal jurisdiction:  
12 California, or the United States. District courts generally derive  
13 their jurisdiction over defendants from the proper service of  
14 process as to those defendants, and their jurisdiction is therefore  
15 bounded by the statutes that authorize service. See Action  
16 Embroidery Corp. v. Atl. Embroidery, Inc., 368 F.3d 1174, 1177 (9th  
17 Cir. 2004). Bray argues that under certain federal statutes that  
18 authorize nationwide service of process, any federal district court  
19 has jurisdiction over a properly served defendant that has minimum  
20 contacts with the United States. Opp'n at 8. Bray is correct in  
21 this regard -- where Congress establishes nationwide service of  
22 process, such service may establish personal jurisdiction over a  
23 defendant. In Action Embroidery, the Ninth Circuit recounted that  
24 "the relevant forum with which a defendant must have 'minimum  
25 contacts' in a suit brought under Section 12 of the Clayton Act is  
26 the United States," rather than the particular state in which the  
27 district court sits. 368 F.3d at 1180. Bray argues that RICO  
28 similarly authorizes nationwide service of process. Opp'n at 8.

1 Under this reasoning, Kendall's contacts with California are  
2 irrelevant to personal jurisdiction, so long as he has minimum  
3 contacts with the United States. However, Action Embroidery,  
4 addressed the service provisions of the Clayton Act, and did not  
5 hold that RICO includes a national service provision. The question  
6 before this Court is therefore whether RICO in fact authorizes  
7 national service of process under Ninth Circuit law.

8 Bray does not identify which RICO provision he is relying on  
9 to authorize national service of process. RICO has two provisions  
10 that circuit courts have identified as relevant to service of  
11 process: Sections 1965(b) and 1965(d) of title 18 of the United  
12 States Code. Section 1965(b) states:

13 [A]ny district court of the United States in  
14 which it is shown that the ends of justice  
15 require that other parties residing in any other  
16 district be brought before the court, the court  
may cause such parties to be summoned, and  
process for that purpose may be served in any  
judicial district of the United States by the  
marshal thereof.

17  
18 18 U.S.C. § 1965(b). Subsection (d) states that "[a]ll other  
19 process in any action or proceeding under this chapter may be  
20 served on any person in any judicial district in which such person  
21 resides, is found, has an agent, or transacts his affairs." Id.  
22 § 1965(d).

23 A circuit split has developed regarding how these provisions  
24 should be read. The Ninth Circuit was the first to address this  
25 issue. It relied exclusively on subsection (b) to conclude that:

26 the right to nationwide service in RICO suits is  
27 not unlimited. For nationwide service to be  
imposed under section 1965(b), the court must  
have personal jurisdiction over at least one of  
28 the participants in the alleged multidistrict

conspiracy and the plaintiff must show that there is no other district in which a court will have personal jurisdiction over all of the alleged co-conspirators.

4 Butcher's Union Local No. 498 v. SDC Invest., Inc., 788 F.2d 535,  
5 538 (9th Cir. 1986) (citations omitted). In other words, the Ninth  
6 Circuit has held that a plaintiff may utilize subsection (b) to  
7 establish personal jurisdiction over codefendants only if there is  
8 personal jurisdiction -- using traditional state-based minimum  
9 contact analysis -- over at least one defendant. This would  
10 require Bray to establish minimum contacts between at least one  
11 Defendant and California. However, Butcher's Union did not address  
12 the significance of subsection (d).

13 Bray cites two decisions issued by the Fourth and Eleventh  
14 Circuits, both of which were authored roughly eleven years after  
15 Butcher's Union, and both of which rely on subsection (d) to  
16 conclude that RICO generally does authorize nationwide service of  
17 process. Republic of Panama v. BCCI Holdings (Luxembourg) S.A.,  
18 119 F.3d 935, 942 (11th Cir. 1997); ESAB Group, Inc. v. Centricut,  
19 Inc., 126 F.3d 617, 626 (4th Cir. 1997). In both of these cases,  
20 the circuit courts found that RICO authorizes nationwide service of  
21 process, and that district courts may therefore establish personal  
22 jurisdiction based upon a defendant's minimum contacts with the  
23 United States where the plaintiff brings a RICO claim. Because  
24 Bray cites Panama and ESAB Group to support his arguments, this  
25 Court assumes that Bray is not basing his assertion of nationwide  
26 service of process on this subsection.

27 Kendall argues that this Court should not adopt the reading of  
28 subsection (d) that is found in Panama and ESAB Group. Although

1 the Ninth Circuit has not revisited the question of nationwide  
2 service under RICO since Butcher's Union, Kendall argues that the  
3 position of the Fourth and Eleventh Circuits has not spread to  
4 other circuits, and is effectively precluded by Butcher's Union.  
5 Kendall Supplemental Br. at 3-4. This Court agrees. The Tenth  
6 Circuit thoroughly addressed the progression of case law  
7 surrounding RICO's service provisions in Cory v. Aztec Steel Bldg.,  
8 Inc., 468 F.3d 1226, 1229-33 (10th Cir. 2006). It first observed  
9 that the Seventh and Second Circuits had already taken positions  
10 similar to that taken by the Ninth Circuit in Butcher's Union, by  
11 looking exclusively to subsection (b) to permit conditional  
12 nationwide service. Id. at 1230 (citing PT United Can Co. v. Crown  
13 Cork & Seal Co., 138 F.3d 65 (2nd Cir. 1998); Lisak v. Mercantile  
14 Bancorp, Inc., 834 F.2d 668, 671 (7th Cir. 1987)). It noted that  
15 the Second Circuit had analyzed the entirety of 18 U.S.C. § 1695 to  
16 conclude that jurisdiction must rest on § 1965(b) alone, and  
17 explicitly rejected using subsection (d) to authorize nationwide  
18 service of summons, finding that its reference to "other process"  
19 referred only to process other than summons or government  
20 subpoenas. Id. (citing PT United, 138 F.3d at 72). The Tenth  
21 Circuit adopted this position as well, id. at 1231, as did the D.C.  
22 Circuit two years later, FC Inv. Group LC v. IFX Mkts., Ltd, 529  
23 F.3d 1087, 1099 (D.C. Cir. 2008).

24 Although this Court requested additional briefing on the issue  
25 of nationwide service of process after Bray raised the argument in  
26 his Opposition, Bray did not address this issue in his Supplemental  
27 Opposition, and has not suggested that the Ninth Circuit's position  
28 has shifted since Butcher's Union. Given the Ninth Circuit's

1 decision with respect to subsection (b), its silence with respect  
2 to subsection (d), and other circuit courts' rejection of  
3 nationwide service under subsection (d), this Court will not allow  
4 Plaintiff to rely on subsection (d) alone to establish  
5 jurisdiction. "When a civil RICO action is brought in a  
6 district court where personal jurisdiction can be established over  
7 at least one defendant, summonses can be served nationwide on other  
8 defendants if required by the ends of justice." Cory, 468 F.3d at  
9 1131. Consequently, Bray needs to establish that this Court has  
10 personal jurisdiction over at least one defendant, based on minimum  
11 contacts with California, before he may rely on RICO's nationwide  
12 service of process provision to establish jurisdiction over the  
13 codefendants. Butcher's Union, 788 F.2d at 538.

14 **B. Minimum Contacts with California**

15 Bray has not suggested that Defendants are subject to general  
16 jurisdiction in California. Rather, Bray asserts that "Kendall  
17 purposefully entered into the transaction to sell the Property to  
18 Bray knowing that Bray was an American citizen and that the money  
19 for the purchase price was coming from California." Opp'n at 6.

20 Although Bray apparently held a California residence at the  
21 time that he dealt with PV Real Estate, he claims to have been  
22 residing outside of the United States at the time, within Baja  
23 California. Bray Decl. ¶ 7. Bray met with PV Real Estate in their  
24 office. FAC. ¶ 9. Bray has failed to explain how any act  
25 performed by Defendants or their agents was ever "directed" at  
26 California. Nor has Bray identified a single communication that  
27 was directed to California. This Court is not persuaded that  
28 negotiating with a California resident can suffice to establish

1 personal jurisdiction, where there is no basis to conclude that any  
2 of the negotiations took place in California.

3 Bray informed PV Real Estate that he would be paying for the  
4 property with funds that were located in California, and that  
5 Defendants "caused" him to wire these funds from California into  
6 the escrow account in Florida. Bray Decl. ¶¶ 8, 11. However,  
7 drawing funds from a California bank account is not sufficient to  
8 establish jurisdiction in California. "[T]he bank on which a check  
9 is drawn is generally of little consequence to the payee and is a  
10 matter left to the discretion of the drawer. Such unilateral  
11 activity of another party or a third person is not an appropriate  
12 consideration when determining whether a defendant has sufficient  
13 contacts with a forum State to justify an assertion of  
14 jurisdiction." Helicopteros, 466 U.S. at 416-17; see also Synergy,  
15 Inc. v. Manama Textile Mills, W.L.L., No. 06-4129, 2008 U.S. Dist.  
16 LEXIS 12791, \*26 (Feb. 20, 2008 D.N.J.) ("[I]t is improper to  
17 sustain specific jurisdiction on the basis of the location of a  
18 resident party's bank."); Int'l Beauty Prods., LLC v. Beveridge,  
19 402 F. Supp. 2d 1261, 1275 (D. Col. 2005) ("[T]he fact that checks  
20 are drawn on a Colorado bank account is not sufficient to show harm  
21 in Colorado when, as here, the checks are cashed in another  
22 state.").

23 Bray offers a number of other sundry connections between the  
24 Defendants and California, but none of these are sufficient to  
25 establish minimum contacts. Although Kendall admits to having been  
26 to California, he has not come since 1981. Kendall Decl. ¶ 3. The  
27 fact that Kendall's "friend and agent" at PV Real Estate frequently  
28 comes to California or advertises in California is insufficient.

1 See Bray Decl. ¶ 27. This connection is far too tenuous to support  
2 asserting personal jurisdiction over Kendall or the other  
3 Defendants. The Court concludes that Bray has not made a prima  
4 facie showing of minimum contacts between Kendall, or any other  
5 Defendant, and the State of California.<sup>4</sup>

6 **C. Transfer**

7 Bray has requested that this suit be transferred to Florida in  
8 the event that personal jurisdiction is found lacking. Opp'n at 8.  
9 28 U.S.C. § 1406(a) states that "[t]he district court of a district  
10 in which is filed a case laying venue in the wrong division or  
11 district shall dismiss, or if it be in the interests of justice,  
12 transfer such case to any district in or division in which it could  
13 have been brought." 28 U.S.C. § 1406(a). The question is  
14 therefore whether justice requires transfer of this suit to  
15 Florida, rather than dismissal.

16 The only affirmative reason that Bray provides for transfer is  
17 that "Kendall admits he resides in Florida." Id. at 9. Bray  
18 never explains why the interests of justice require transfer. He  
19 does not explain why he would be prejudiced by a failure to  
20 transfer. He does not suggest that a statute of limitations has  
21 run that would prevent him from refiling in a more proper forum.  
22 The Court may decline to transfer based solely upon this failure.

23 What Bray does provide is several pages of briefing to explain  
24 why the forum-selection provision of the offer document that he  
25 signed is inoperative (in fact, this is the only topic that is  
26 substantially addressed by Bray's supplemental brief). Opp'n at

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27 <sup>4</sup> Because of the Court's finding with respect to personal  
28 jurisdiction, it need not reach Kendall's claim that venue is  
improper.

1 9-11; Supplemental Opp'n at 1-4. The Court is unpersuaded. Bray  
2 has not met his burden of establishing that the forum-selection  
3 provision is unenforceable, and this provision weighs against  
4 transferring this case to Florida in the interest of justice.  
5 Although this suit does involve two United States citizens, it is  
6 not a local dispute, and the parties have unambiguously selected a  
7 Mexican forum to resolve it. The contract stated that the parties  
8 would submit to the jurisdiction of the Court and Tribunals of the  
9 City of Puerto Vallarta for "interpretation and execution of the  
10 present Offer . . . waiving to those [jurisdictions] that may  
11 correspond them by virtue of their present and future domiciles."  
12 Bray Decl. Ex. B ("Bray Offer") at 5. This language does more  
13 than designate a Mexican forum as a possible forum -- it  
14 unambiguously waives access to the jurisdictions of the parties'  
15 home fora. Bray has not stated any compelling reason why the  
16 chosen forum is inadequate, or even inconvenient, except by  
17 stating in a conclusory manner that a Mexican forum will not be  
18 "expeditious and fair" and will be "unpredictable and corrupt."  
19 Opp'n at 11. Bray has not presented any compelling reason why  
20 transfer to Florida is in the interest of justice.  
21

22 **V. CONCLUSION**

23 The First Amended Complaint is hereby DISMISSED for lack of  
24 personal jurisdiction over Defendants.

25 IT IS SO ORDERED.  
26

27 Dated: January 5, 2010  
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\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE